Supreme Court, U.S.
FILED
MAY 11 1992
OFFICE OF THE CLERK

No. 91-1380

In the Supreme Court of the United States

OCTOBER TERM, 1991

SHMUEL DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's concurrent sentences on a continuing criminal enterprise (CCE) count and 14 predicate substantive drug counts violate the Double Jeopardy Clause.

2. Whether the court of appeals erred in affirming an upward adjustment of petitioner's offense level under Sentencing Guidelines § 2D1.1(b)(1) on grounds different from those the district court recited.

3. Whether the government carried its burden under 18 U.S.C. 2518(5) of showing that Hebrew interpreters were "not reasonably available" in order to justify after-the-fact minimization of telephone conversations in Hebrew intercepted pursuant to a wiretap order.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981)	8
Diaz v. *United States*, 223 U.S. 442 (1912)	9
Garrett v. *United States*, 471 U.S. 773 (1985)	8, 9, 10
Missouri v. *Hunter*, 459 U.S. 359 (1983)	8
Scott v. *United States*, 436 U.S. 128 (1978)	13
United States v. *Amen*, 831 F.2d 373 (2d Cir. 1987), cert. denied, 485 U.S. 1021 (1988)	9
United States v. *Burt*, 765 F.2d 1364 (9th Cir. 1985)	9
United States v. *Devine*, 934 F.2d 1325 (5th Cir. 1991)	9
United States v. *Jefferson*, 782 F.2d 697 (7th Cir. 1986)	9
United States v. *Jones*, 918 F.2d 909 (11th Cir. 1990)	9
United States v. *Morrow*, 929 F.2d 566 (10th Cir. 1991)	9
United States v. *Rivera-Martinez*, 931 F.2d 148 (1st Cir.), cert. denied, 112 S. Ct. 184 (1991)	6, 9
United States v. *Schuster*, 769 F.2d 337 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986)	9
Williams v. *United States*, 112 S. Ct. 1112 (1992)	12

Constitution, statutes and rule:

U.S. Const. Amend. V (Double Jeopardy Clause)	6, 8, 9, 10
Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207	10
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181	10

Statutes and rule—Continued: Page

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520 3
18 U.S.C. 2518(5) 3-4, 5, 12, 13
Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 10
18 U.S.C. 3742 11
21 U.S.C. 841(a)(1) 2
21 U.S.C. 843(b) 2
21 U.S.C. 846 2
21 U.S.C. 848 2
Fed. R. Crim. P. 52(a) 12
Sentencing Guidelines:
§ 2D1.1(b)(1) 5, 7, 11, 12
App. C, Amendment Nos. 139, 303 (Nov. 1, 1991) 12

Miscellaneous:

S. Rep. No. 541, 99th Cong., 2d Sess. (1986) 7

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1380

SHMUEL DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A93) is reported at 940 F.2d 722.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1991. On September 27, 1991, the court of appeals denied a petition for rehearing. Pet. App. A93-A95. On December 17, 1991, Justice Souter extended the time for filing a petition for a writ of certiorari to February 24, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on one count of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848; two counts of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; 14 counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and five counts of unlawful use of a telephone, in violation of 21 U.S.C. 843(b). He was sentenced to 30 years' imprisonment, to be followed by three years of special parole and five years of supervised release, and was fined $500,000. The court of appeals vacated petitioner's convictions and sentences on the two drug conspiracy counts but affirmed his convictions and sentences on the remaining counts. Pet. App. A1-A93.

1. The evidence at trial showed that petitioner organized and supervised a large-scale cocaine distribution enterprise centered in Boston, Massachusetts, between late 1986 and April 28, 1988. During that period, petitioner distributed from seven to ten kilograms of cocaine per month. From late 1986 through March 1988, petitioner obtained cocaine from suppliers in Florida. Reuven Furer acted as petitioner's middleman in Florida. Co-conspirators Mordechai "Nuni" Mizrahi and Joseph "Yossi" Zalmanovich assisted petitioner in obtaining and distributing the cocaine. Eli Filin and Richard Parish were couriers who transported the cocaine shipments from Florida to Boston. Pet. App. A29-A31; Gov't C.A. Br. 4-9.

In June 1987, Filin stole a ten-kilogram shipment of cocaine by faking a robbery with an accomplice. Shortly thereafter, petitioner arranged for Filin to

deliver another shipment of cocaine to Boston. When Filin arrived, petitioner and Mizrahi escorted him to an apartment where two individuals known as "Moshe One" and "Moshe Two" were waiting. Filin was tied to a chair, beaten, and threatened with his life unless he told petitioner where the missing shipment was. Petitioner held a gun to Filin's head. Several days later, after he failed a lie detector test, Filin confessed and agreed to return the stolen cocaine to petitioner. Pet. App. A31-A33; Gov't C.A. Br. 9-12.

In February 1988, petitioner and Mizrahi met with Furer and the Florida suppliers to discuss purchasing larger quantities of cocaine. When those negotiations were unsuccessful, petitioner and his accomplices made arrangements to obtain cocaine directly from Colombian suppliers. Soon after the first shipment from Colombia was delivered, however, the conspirators were arrested. Pet. App. A37-A41; Gov't C.A. Br. 12-19.

2. On February 17, 1988, the district court authorized government agents pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1986, 18 U.S.C. 2510-2520, to intercept wire communications over a telephone subscribed to by co-defendant Eliahu Abramson at an apartment that he shared with petitioner in Brookline, Massachusetts. In his affidavit supporting the application for the wiretap order, DEA Agent Daniel Doherty informed the district court that the Hebrew language was likely to be used during the intercepted conversations and that the government was in the process of locating interpreters capable of understanding modern Hebrew. The agent stated in his affidavit that intercepted conversations in Hebrew would be recorded in their entirety and then minimized pursuant to 18 U.S.C.

2518(5) as soon as Hebrew interpreters became available.[1] Pet. App. A19-A22; Gov't C.A. Br. 89-93.

Between February 17 and March 5, 1988, the government recorded in full several telephone conversations in Hebrew. In the meantime, the government arranged to obtain the assistance of Israeli police officers to interpret the taped conversations. The Israeli officers arrived in Boston on March 1. They were briefed on wiretap procedures under Title III and began monitoring intercepted telephone conversations on March 5. In addition, the Israeli police officers reviewed the telephone conversations in Hebrew that had already been taped in full before March 5. In reviewing those conversations, the monitoring interpreters replicated the minimization procedure that would have taken place had the interpreter been monitoring the conversation when it was intercepted. That is, the interpreters listened to and interpreted only the portions of the conversations that related to the investigation; they stopped listening to the tapes when they determined that the conversations were about matters outside the scope of the investigation. Pet. App. A21-A24; Gov't C.A. Br. 94-98.

---

[1] Section 2518(5) provides in pertinent part:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. * * *

Prior to trial, petitioner moved to suppress the Hebrew conversations that were taped in full between February 17 and March 5, 1988, on the ground that the government had failed to comply with the minimization requirements of 18 U.S.C. 2518(5). He argued that the after-the-fact minimization of those conversations by the Israeli police officers was not sufficient because the government had not demonstrated that Hebrew interpreters were "not 'reasonably available' " when it obtained the wiretap order. At the suppression hearing, the government explained that it had been difficult to obtain the required number of Hebrew interpreters because of the difference between the "common, everyday Hebrew" spoken by the conspirators and "biblical Hebrew," and because of the need for Hebrew interpreters who were familiar with the terminology of drug trafficking. The government also explained that using interpreters from the local area would have presented a security risk. The district court denied petitioner's motion to suppress. Pet. 11-14, 56-58; Gov't C.A. Br. 94-95.

3. For the offenses committed after November 1, 1987 (and therefore subject to the Sentencing Guidelines), the district court determined that petitioner's Sentencing Guidelines range was 292 to 365 months' imprisonment, based on an offense level of 40 and a criminal history category of I. In computing the offense level of 40, the district court included a two-level upward adjustment pursuant to Sentencing Guidelines § 2D1.1(b)(1) for the use of a firearm during the commission of at least one of the offenses. The court based the two-level adjustment on the evidence at trial showing that "[a] gun was used on more than one occasion." Pet. 41. In particular, the court noted the evidence showing that a gun was held to Filin's head when petitioner and his accomplices

questioned Filin about the stolen cocaine shipment in June 1987. Pet. 41-42 The court found that "the use of the weapon furthered the commission of the offense, and certainly there is no question in my mind that [petitioner] was responsible for its use." Pet. 42. See Pet. App. A82-A84, A86-A87; Gov't C.A. Br. 41-42.

4. The court of appeals vacated petitioner's convictions and sentences on the two drug conspiracy counts but affirmed his convictions and sentences on the other 20 counts. Pet. App. A1-A93. Relying on its decision in *United States* v. *Rivera-Martinez*, 931 F.2d 148, 152-154 (1st Cir.), cert. denied, 112 S. Ct. 184 (1991), the court ruled that petitioner's separate convictions for the two drug conspiracy counts and the CCE count violated the Double Jeopardy Clause. Pet. App. A67-A68. But the court rejected petitioner's claim that the Double Jeopardy Clause barred his separate convictions on the counts charging substantive predicate offenses and the CCE count. It explained that, "unlike in situations where CCE and conspiracy counts are intertwined, Congress intended there to be separate punishments for both a CCE offense and any substantive predicate offenses." Pet. App. A69. The court therefore concluded that "the Double Jeopardy Clause does not prohibit conviction and sentence on both a CCE count and a count charging an underlying substantive act." *Ibid.*

The court of appeals also rejected petitioner's claim that the intercepted Hebrew telephone conversations should have been suppressed. Pet. App. A19-A24. It found that "after-the-fact minimization, which is expressly authorized by Title III, [was] appropriate" because "the evidence indicated that, despite reasonable, good-faith efforts, Hebrew interpreters were not available at all times." *Id.* at A22. The court also noted that "[t]he DEA's protocol was designed to replicate

what would happen in a contemporaneous minimization." *Id.* at A23. The court concluded that, "[b]y translating only the portions of the tapes that seemed relevant, the government's actions comported with the expectations of Congress * * * and were acceptable under Title III." *Id.* at A24 (citing S. Rep. No. 541, 99th Cong., 2d Sess. 1, 30 (1986)).

The court of appeals also upheld the district court's two-level increase in petitioner's offense level under Sentencing Guidelines § 2D1.1(b)(1) as part of its calculation of petitioner's Guidelines range. Pet. App. A86-A87. It noted that the district court's factual findings were not clearly erroneous because "[t]he evidence obviously supports the finding that [petitioner] was responsible for the gun's use, whether or not he actually held the gun." *Id.* at A87. The court concluded that "[i]t was perfectly reasonable for the sentencing judge to conclude that, in brandishing a firearm (or causing one to be brandished) while trying to retrieve a stolen consignment of cocaine, [petitioner] was furthering the substantive offense related to that shipment." *Ibid.*[2]

5. The court of appeals denied a petition for rehearing. The court noted that the petition "focused exclusively upon the district court's upward adjustment of the guideline sentencing range to reflect the use of a firearm in connection with the commission of the offenses of conviction, particularly the continuing criminal enterprise (CCE) charge." Pet. App. A93-A94. The court declined to consider petitioner's argument that "the Sentencing Guidelines in effect at the time he was sentenced contained a lacuna making

---

[2] The court of appeals also rejected numerous other claims by petitioner that he does not renew in this Court. See Pet. App. A7-A20, A24-A34, A53-A67, A77-A86.

the gun possession enhancement inapplicable to a CCE charge under 21 U.S.C. § 848," because petitioner had "failed to make the argument at the time of sentencing or to object to the presentence report on this basis." *Id.* at A94-A95.

ARGUMENT

1. a. Petitioner contends (Pet. 24-40) that even though he was subjected to only a single prosecution, the Double Jeopardy Clause prohibits separate convictions and cumulative sentences on a CCE count and on substantive drug counts that are predicate offenses of the CCE offense.[3] This Court's decision in *Garrett* v. *United States*, 471 U.S. 773 (1985), forecloses petitioner's contention. In *Garrett*, the Court held that separate convictions and cumulative punishment for a CCE offense and for the underlying substantive predicate offenses do not violate the Double Jeopardy Clause. The Court explained that, when only a single prosecution is involved, "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Id.* at 793 (quoting *Missouri* v. *Hunter*, 459 U.S. 359, 366 (1983), and *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981)). The Court in *Garrett* determined that "logic supports the conclusion, also indicated by the legislative history, that Congress intended separate punishments for the underlying substantive predicates and for the CCE offense." 471 U.S. at 795. In the wake of *Garrett*, the courts of appeals have uniformly held

[3] As an initial matter, petitioner's sentences were not "cumulative" in the ordinary sense of that term. He received concurrent, rather than consecutive, sentences on the CCE count and the substantive drug counts. See Pet. App. A6 n.2; Gov't C.A. Br. 3.

that separate convictions and cumulative punishment for a CCE offense and for the substantive predicate offenses do not violate the Double Jeopardy Clause.[4]

Petitioner's attempt (Pet. 30-31) to distinguish *Garrett* on its facts is unpersuasive. In *Garrett*, the defendant was first prosecuted for substantive drug offenses and later prosecuted for engaging in a CCE. In rejecting the defendant's argument that the Double Jeopardy Clause barred the successive prosecutions, the Court relied on the fact that the CCE in that case continued after the date of the indictment for the predicate offense. 471 U.S. at 790-793 (citing *Diaz* v. *United States*, 223 U.S. 442 (1912)). Petitioner argues that because the CCE offense in this case did not continue beyond the date of the last predicate offense, *Garrett* is inapplicable. But the portion of the Court's opinion on which petitioner focuses is the portion that deals with the problem of successive prosecutions; it is the portions that deal with cumulative punishment for a CCE offense and its underlying predicate offenses that are relevant here. In the portions of the opinion dealing with the cumulative punishment issue, the Court made clear that the Double Jeopardy Clause does not forbid the government from bringing a single prosecution that results in separate convictions and cumulative

---

[4] See, *e.g.*, *United States* v. *Devine*, 934 F.2d 1325, 1345-1346 (5th Cir. 1991); *United States* v. *Rivera-Martinez*, 931 F.2d 148, 152-154 (1st Cir.), cert. denied, 112 S. Ct. 184 (1991); *United States* v. *Morrow*, 929 F.2d 566, 567-568 (10th Cir. 1991); *United States* v. *Jones*, 918 F.2d 909, 910-911 (11th Cir. 1990); *United States* v. *Amen*, 831 F.2d 373, 381 (2d Cir. 1987), cert. denied, 485 U.S. 1021 (1988); *United States* v. *Jefferson*, 782 F.2d 697, 701 (7th Cir. 1986); *United States* v. *Schuster*, 769 F.2d 337, 345 (6th Cir. 1985), cert. denied, 475 U.S. 1021 (1986); *United States* v. *Burt*, 765 F.2d 1364, 1369 (9th Cir. 1985).

sentences for both a CCE offense and for the substantive drug offenses that are predicates of the CCE offense. The Court explained that "[t]he rule stated in *Blockburger* [v. *United States*, 284 U.S. 299 (1932) is] applied as a rule of statutory construction to help determine legislative intent" and "is not controlling when the legislative intent is clear from the face of the statute or the legislative history." 471 U.S. at 778-779. The Court went on to conclude that "[t]he language, structure, and legislative history of the Comprehensive Drug Abuse, Prevention and Control Act of 1970 * * * show in the plainest way that Congress intended the CCE provision to be a separate criminal offense which was punishable in addition to, and not as a substitute for, the predicate offenses." *Id.* at 779. Because Congress intended separate punishments for the underlying substantive predicates and for the CCE offense, such cumulative punishment does not violate the Double Jeopardy Clause. *Id.* at 793-795.

b. There is likewise no merit in petitioner's claim (Pet. 35-40) that this Court should reexamine *Garrett* in light of Congress's enactment of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, and the increase in the penalties for CCE offenses provided in the Anti-Drug Abuse Acts of 1986 and 1988 (Pub. L. No. 99-570, 100 Stat. 3207; Pub. L. No. 100-690, 102 Stat. 4181). As petitioner notes (Pet. 29-30), the Court in *Garrett* drew some support for its conclusion that Congress intended cumulative punishment for a CCE offense and for the substantive predicate offenses from the fact that "disallowing cumulative sentences would have the anomalous effect in many cases of converting the large fines provided by § 848 into ceilings." 471 U.S. at 794. But there is no indication that the increased penalties for

the CCE offense enacted in 1986 and 1988 were intended to overturn the Court's decision in *Garrett* and announce Congress's intention to prohibit the common practice of charging and convicting defendants of both the CCE offense and its predicates in the same indictment.

2. Petitioner also contends (Pet. 40-54) that the court of appeals exceeded the scope of its authority to review sentences under 18 U.S.C. 3742 when it affirmed the two-level adjustment in his offense level under Sentencing Guidelines § 2D1.1(b)(1) for possession of a dangerous weapon during the commission of an offense. Petitioner does not dispute that the evidence that a gun was held to the head of the drug courier when he was questioned about the stolen cocaine shipment would justify an adjustment under Sentencing Guidelines § 2D1.1(b)(1). Rather, petitioner argues (Pet. 42-43) that the district court erroneously applied the firearm enhancement in this case because the incident related to a substantive drug offense that occurred before the effective date of the Sentencing Guidelines. But as the court of appeals indicated (Pet. App. A93-A94), the use of a firearm also related directly to the CCE offense, which continued after the effective date of the Sentencing Guidelines.

Petitioner asserts that the district court did not base the firearm enhancement under Section 2D1.1 (b)(1) on the CCE offense. In fact, the district court found that "[a] gun was used on more than one occasion," and that on one occasion a gun was held to Filin's head to induce him to return a stolen shipment of cocaine. The court further found that "the use of the weapon furthered the commission of the offense, and certainly there is no question in my mind that [petitioner] was responsible for its use." Pet. 42; Pet.

App. A82-A84, A86-A87. Although the district court could have stated more clearly that petitioner's use of guns furthered the CCE offense, there can be no doubt that petitioner's use of a gun to further the substantive offense of possession of cocaine with intent to distribute also furthered the CCE. The *raison d'etre* of the criminal enterprise was the distribution of cocaine. By using a gun to recover a large stolen shipment of cocaine, petitioner plainly furthered the CCE. In these circumstances, the district court's sentence was not imposed in violation of law or as a result of an incorrect application of the Sentencing Guidelines. And even if the district court's lack of precision is viewed as a misapplication of the Guidelines, the court's error could not have affected the sentence, and therefore was harmless. Accordingly, the court of appeals properly affirmed the sentence. See *Williams* v. *United States*, 112 S. Ct. 1112, 1121 (1992); Fed. R. Crim. P. 52(a).[5]

3. Finally, petitioner contends (Pet. 55-63) that the intercepted Hebrew telephone conversations that were recorded in full between February 17 and March 5, 1988, should have been suppressed because the government failed to carry its burden of justifying after-the-fact minimization of those conversations

---

[5] Petitioner "does not press" his additional contention that the version of Guidelines § 2D1.1(b) applicable to his offense did not apply to a CCE offense. Pet. 49. The court of appeals declined to consider that argument because petitioner raised it for the first time in his petition for rehearing. Pet. App. A94. Moreover, the Sentencing Guidelines have now been amended to make it clear that the firearm enhancement applies to CCE offenses. See Sentencing Guidelines App. C, Amendment Nos. 139, 303 (Nov. 1, 1991). The amendments eliminate any need for this Court to resolve the issue whether the firearm enhancement of Section 2D1.1(b)(1) may be based on a CCE offense.

under Title III's minimization requirements, 18 U.S.C. 2518(5).

Title III expressly provides that "[i]n the event the intercepted communication is in a * * * foreign language, and an expert in that foreign language * * * is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception." 18 U.S.C. 2518(5). Here, petitioner's sole claim (Pet. 59) is that the government failed to carry its burden of showing that no expert in the Hebrew language was "reasonably available" for contemporaneous minimization of the intercepted telephone conversation between February 17 and March 5, 1988. Given the government's need for Hebrew interpreters who were familiar with everyday Hebrew as used by drug traffickers and who would not pose a security risk to the investigation, both courts below concluded that the government acted reasonably in obtaining the interpreters from the Israeli police. Cf. *Scott* v. *United States*, 436 U.S. 128, 140 (1978). Petitioner's fact-bound claim to the contrary does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

MAY 1992